IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 1531 of 1999

For Approval and Signature:

HON'BLE MR.JUSTICE H.K.RATHOD

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : YES

3. Whether Their Lordships wish to see the fair copy of the judgement? : YES

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

UDAYKUMAR THAKORBHAI BHATT

Versus

INDUSTRIES COMMISSIONER

Appearance:

1. Special Civil Application No. 1531 of 1999

MRS KETTY A MEHTA for Petitioner No. 1

MR VB GHARANIYA for Respondent

MR PANDYA, AGP for Respondent

CORAM : HON'BLE MR.JUSTICE H.K.RATHOD

Date of decision: 02/09/2003

ORAL JUDGEMENT

Heard learned advocate Mrs. Ketty A Mehta for

the petitioner and learned AGP Mr. Pandya appearing on behalf of respondent.

2. According to the petitioner he was appointed as Statistical Assistant by order dated 10.3.1980. Thereafter petitioner had joined the service as Statistical Assistant on 15.3.1980 and the petitioner was confirmed on the said post. On 11.7.1989 petitioner was promoted to the post of Junior Industries Inspector. On 13.7.1989 the petitioner wrote a letter to the Officer on Special Duty and Industries Commissioner wherein he stated that he has taken over the charge with prior approval and made it clear that if he is not continued after 8 months as Junior Industries Inspector, he should be sent back as Statistical Assistant or Supervisor Gra.II which are equivalent posts in the office of the Industries Commissioner, Gujarat State. The petitioner appeared in the qualifying examination prescribed by the department. In the first attempt, the petitioner failed; in the second attempt, the department did not allow grading in the aggregate though the rules permitted the same and in the third attempt, on the day when the departmental examination was to be held, petitioner was informed at 10:00 am at Valsad about the examination being held at Ahmedabad at 11:00 am. The petitioner could not appear at the said examination. Thereafter the petitioner left the job willingly due to ill-health and family circumstances on 30.9.1996. The petitioner approached the State of Gujarat, Industries & Mines, Gandhinagar for fixation of his pension on the ground of invalidity and ill-health. The answer given by the Deputy Secretary, Department of Industries and Mines on 5.1.1998 condoning break of eight months' service required to complete 10 years of service according to the relevant rules in respect of the petitioner and granted the petitioner the pension. On 28.7.1998, General Manager, District Industries Centre, Valsad by his communication dated 28.7.1998 send the necessary pension papers to the Director of Pension and Provident Fund, Gujarat State, Ahmedabad for necessary action. Petitioner's service book was also sent along with that communication. It was requested that the petitioner's pension case should be accepted in view of the order passed by the Government of Gujarat on 5.1.1998. But same has been objected by the Director of Pension & Provident Fund on the ground that it is not the case of retirement but it is the case of resignation and therefore, petitioner is not entitled the pensionary benefits. That is how, the present petition has been filed by the petitioner.

3. On behalf of the respondent affidavit-in-reply has been filed by D.S.Vansda, Deputy Director of Pension & Provident Fund and only contention has been raised in the reply that as the petitioner has tendered his resignation from service he is not entitled to get pensionary benefit. This being the only defence raised in the entire reply by the respondents. However, in respect to the falling short qualifying service, the order is already passed on 5.1.1998 by the authority. In view of this fact, learned advocate Mrs. Mehta appearing on behalf of the petitioner has relied upon two decisions; one of the Apex Court and the other of the Division Bench of Delhi High Court. She relied on the decision in the case of M/S J.K.COTTON SPG. & WVG. MILLS COMPANY LTD., KANPUR V. STATE OF U.P. AND OTHERS, AIR 1990 SC 1808 and the decision of the Division Bench of Delhi High Court in the case of ASHWANI KUMAR SHARMA V. ORIENTAL BANK OF COMMERCE, 2003 (2) LLJ 575. Relying upon these two decisions Mrs. Mehta submitted that, resignation, whether could be treated as voluntary retirement for the purpose of pensionary benefit or not. The Division Bench of Delhi High Court has considered and same has been treated as retirement and petitioner was entitled the pensionary benefit.

4. Learned AGP Mr. Pandya appearing on behalf of the respondent has submitted that according to the Pension rules, employee who has tendered resignation is not entitled the benefit of pension and, therefore, the claim of the petitioner has rightly been rejected by the department. He also submitted that the State Government has passed an order on 5.1.1998, wherein, falling short qualifying service has been condoned while exercising the power under Bombay Civil Service Rules, that is also wrong because according to the Director, once the petitioner is not eligible for pension then where is the question of condoning the short falling service of the petitioner. Therefore, according to him there is no substance in the petition and the same is required to be dismissed.

5. I have considered the submissions made by both the learned advocates and facts which are not in much dispute between the parties. It is necessary to note one important aspect of the matter that service of the petitioner was terminated by the respondent and that termination order was challenged in Special Civil Application No. 571 of 1992 before this Court wherein the petition was admitted and interim relief to maintain statusquo was granted and, by virtue of that interim order, the petitioner remained continued in service and

ultimately gave resignation on 30.9.1996, meaning thereby, that the petitioner was in service from 15.3.1980 till 30.9.1996. Because in guise of interim order passed by this Court he remained in continuous service without any break and ultimately that Special Civil Application No. 571 of 1992 has been disposed of on the basis of the fact that petitioner has now resigned from service on 30.9.1996. So, whatever the period petitioner was remained in service because of the interim order passed by this Court, that service must have to be considered continued by the respondent. This view has been taken by the Division Bench of this Court in case of UNION OF INDIA AND ANOTHER V. PREMA DHAMA, 2000 (4) GLR 3081. The Division Bench of this Court has held that if any employee remained in service because of interim order passed by the Court, then his service during the interim period must have to be considered continuous and employee is entitled the salary of that interim period and also entitled the retirement benefits including pension and gratuity. This aspect has also been examined earlier by this Court in the case of BACHU LAXMAN V. UNION OF INDIA AND OTHERS, 1984 (2) GLR 1336. The relevant observations are quoted as under:

> "The petitioner has continued to serve under the interim relief granted by this Court and therefore, the various retirement benefits should be fixed on the basis of the benefits that accrued to him on the basis of last pay drawn and the retirement benefits should not be fixed on the basis that the petitioner had retired on some earlier date i.e. 31.3.1981. The Railway Administration cannot now deny the similar benefits to the petitioner who has been allowed to work upto 31.3.1983 and to whom all the benefits of salary and other consequential benefits must have been given by the Railway Administration. The petitioner continued to enjoy the benefits under the interim relief granted by the court and as such he has been in receipt of these benefits. The petitioner would be entitled to the benefits on the basis of the salary received on 31.3.1984, and will be entitled to fixation of pension as if he has retired on 31.3.1983.
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> In the result, I allow this Civil Application of the petitioner. The pension and other retirement benefits of the petitioner will be given as if he has retired from service on 31.3.1983. The petitioner is permitted to

withdraw the above Special Civil Application and the same stands disposed of as withdrawn with no order as to costs. The petitioner has already retired from service on 31.3.1983 and still the petitioner has not been paid any amount towards the retirement benefits and even the pension has not been fixed till today, though the Railway authorities filed Civil Application No. 1359 of 1983 for permitting them to retire the petitioner with effect from 31.3.1983 and the petitioner in fact retired from 31.3.1983. The petitioner should have given by the Railway Administration his retirement dues and should have fixed the pension of the petitioner at the earliest. As this has not been done, I direct the Railway Administration to finalise the retirement benefits of the petitioner including gratuity and fixation of pension, as directed above, within three months from the date of receipt of the writ of this Court. The Railway authorities will furnish to this Court information regarding the steps taken by them to comply with the above order, at the end of three months. Civil Application is accordingly disposed of with no order as to costs."

6. In view of the decision of the Division Bench of this Court and the learned Single Judge of this Court as referred above, the service which has been rendered by the petitioner because of the interim order operating in favour of the petitioner that service must have to be considered continuous and there cannot be considered to be any break and petitioner is entitled the benefit of that continuity of service as per the service rules.

7. In respect to the contention raised by the respondent that the petitioner has tendered his resignation and therefore he is not entitled the benefit of pension and pension rules are not applicable to the facts of the present case, the Apex Court has considered this aspect in the case of M/s J.K.Cotton Spg. & Wvg. Mills Company Ltd. Kanpur (Supra), wherein it has been held that tendering resignation voluntarily by the employee amounts to retirement and not retrenchment. The relevant observations made in paragraph 8 are quoted as under:

"In the present case the employee's request contained in the letter of resignation was accepted by the employer and that brought an end to the contract of service. The meaning of

term 'resign' as found in the Shorter Oxford Dictionary includes 'retirement'. Therefore, when an employee voluntarily tenders his resignation it is an act by which he voluntarily gives up his job. We are, therefore, of the opinion that such a situation would be covered by the expression 'voluntary retirement' within the meaning of Cl. (i) of Sec.2(s) of the State Act. In Santosh Gupta's case (AIR 1980 SC 1219), Chinnappa Reddy, J. observed as under (at p. 1220 of AIR):

'Voluntary retrenchment of a workman or the retrenchment of the workman on reaching the age of superannuation can hardly be described as termination, by the employer, of the service of a workman.' (Here the work 'retrenchment' has reference to 'retirement').

The above observation clearly supports the view which commends to us. We are, therefore, of the opinion that the High Court was not right in concluding that because the employer accepted the resignation offer voluntarily made by the employee, he terminated the service of the employee and such termination, therefore, fell within the expression 'retrenchment' rendering him liable to compensate the employee under S. 6N. We are also of the view that this was a case of 'voluntary retirement' within the meaning of the first exception to Sec. 2(s) and therefore the question of grant of compensation under S. 6N does not arise. We, therefore, cannot allow the view of the High Court to stand."

Similarly, this question has been recently examined by the Division Bench of Delhi High Court in Ashwani Kumar Sharma's case (supra). The relevant observations made in paragraphs 30, 31 and 32 are quoted as under:

"Payment of pension depends upon completion of qualifying service. A person who completes the qualifying service is entitled to pension. Whether the relationship of employer and employee comes to an end by way of resignation or voluntary retirement in a given situation may not matter so as to enable the employer to deprive the employee from the benefit of a beneficent scheme. It may be one thing to

say that a scheme for payment of pension having been introduced at a stage when the concerned employee has retired, would not be entled to the benefit thereof but it is another thing to say that although he, at all relevant times, was in service, he would be deprived therefrom only because he has either resigned or retired voluntarily. Resignation and voluntary retirement stand on slightly different footing but the effect and substance thereof is not of much significance. It may be true that an offer of voluntary retirement may be accepted or may not be accepted but such is a case of resignation also particularly when the concerned employee is faced with departmental proceedings. The employer, having accepted the resignation, even upon waiver of the notice period, cannot be permitted to turn round and contend that he was not entitled to the pensionary benefits. The respondents, as noticed from the factual backdrop of the case, themselves processed the matter for grant of pension. The petitioner was asked to make an amendment to his application for resignation to one for voluntary retirement.

Both resignation and voluntary retirement can be withdrawn before the same take effect (See Balram Gupta v. Union of India and Another(Supra).

Retirement or resignation has also been held to be almost synonymous. In Garment Cleaning Works v. Workmen, AIR 1962 SC 673: 1961-I-LLJ-513, and Remington Rand of India Ltd. v. Workmen, AIR 1970 SC 1421 : 1969 (3) SCC 913, it has been held that qualifying period for gratuity should be different in case of retirement or resignation and in case of dismissal for misconduct. In that case also, thus, retirement or resignation has been held to be at par for the purpose of grant of retiral benefits. In the matter of gratuity, why a long minimum period for earning the same in the case of voluntary retirement or resignation has been provided, the Apex Court has answered in British Paints (India) Ltd. v. Workmen, AIR 1966 SC 732 : 1966-I-LLJ-407 as thereby the workmen may leave one concern for another after putting in the minimum service qualifying for gratuity. There again, the voluntary retirement or resignation had been held to be at par."

8. In view of the observations made by the Apex Court and Division Bench of the Delhi High Court, according to my opinion when the petitioner has tendered resignation on 30.9.1996 which has been accepted by the respondent, therefore, that may be considered to be retirement of the petitioner and for that petitioner is entitled pensionary benefit and all other retiral benefits including gratuity as per the service rules of the respondents.

9. Therefore, according to my opinion, the total service from the date of joining from 15.3.1980 till 30.9.1996 may be considered continuous one without any break in between from the service of the petitioner and on the basis of that petitioner is entitled all the retiral benefits including gratuity and pension and other service benefits as per the service rules.

10. In result, present petition is allowed with a direction to the respondents to consider the total service of the petitioner w.e.f. 15.3.1980 to 30.9.1996 as continuous service and to grant pension in favour of the petitioner while considering his entire service continuous and also to pay other retiral benefits including gratuity to the petitioner within a period of three months from the date of receiving the copy of the said order. Rule is made absolute accordingly. No order as to costs.

(H.K.Rathod,J)

Jayanti*